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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE HONORABLE VAUGHN R. WALKER

IN RE NATIONAL SECURITY AGENCY)MDL 06-1791 VRW
TELECOMMUNICATIONS RECORDS)Related Case C 07-0109 VRW
LITIGATION)Related Case C 0672 VRW
)Friday
)September 12, 2008

TRANSCRIPT OF PROCEEDINGS

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P R O C E E D I N G S

SEPTEMBER 12, 2008

11:12 a.m.

THE CLERK: Calling MDL 06-1791, In Re NSA Telecommunications Records Litigation, and this relates to Civil 07-109, Al Haramain versus George Bush.

THE COURT: Never heard so many silent lawyers in my life. You want to enter an appearance?

MR. EISENBERG: Jon Eisenberg for Al Haramain, Belew and Ghafoor.

THE COURT: All right. That's how you do it.

MR. COPPOLINO: Your Honor, Anthony Coppolino, Department of Justice, for the United States.

THE COURT: Welcome back.

MR. EISENBERG: Thank you, your Honor.

THE COURT: We are here basically to set a schedule in Al Haramain and in the other cases.

Let me tell you what I have in mind. I think it would expedite matters in this case to have both the motions which the parties contemplate from Al Haramain, to have the government file its motion to dismiss or its summary judgment motion, however it wishes to characterize that motion, on or before September 30.

The plaintiffs to file its motion for discovery under Section 1806(f) on the same date, September 30.

1 Then the parties to file their respective opposition
2 to the other party's motions on October 23.

3 Reply memoranda on November 13.

4 And we will set the matter down for hearing on
5 December 2nd. We can do that either in the morning or
6 afternoon depending upon what your preference is.

7 How does that schedule sound? Mr. Eisenberg?

8 **MR. EISENBERG:** That's fine with us, your Honor.

9 **THE COURT:** Mr. Coppolino?

10 **MR. COPPOLINO:** You say December the 2nd, your Honor?

11 **THE COURT:** Yes.

12 **MR. COPPOLINO:** That's a Tuesday, not your normal --

13 **THE COURT:** For you, Mr. Coppolino and Mr. Eisenberg,
14 a special setting.

15 **MR. EISENBERG:** I thank you for that, your Honor.

16 **THE COURT:** What's that?

17 **MR. EISENBERG:** I thank you for that, your Honor.

18 **MR. COPPOLINO:** And morning would be preferable, if
19 it please the Court, your Honor.

20 **THE COURT:** Why don't we do it at 10:00 o'clock?

21 **MR. COPPOLINO:** I guess, your Honor, I would just
22 ask the -- obviously, we had set forth our views as to why
23 their motion shouldn't be filed at this point, and I don't want
24 to spend time on that since you appear to have decided --

25 **THE COURT:** Well, I have read the statements and I

1 understand your position, but I think in this case, that is the
2 Al Haramain case, I think you both can present your respective
3 positions and your oppositions.

4 And, obviously, if you persuade me on the motion to
5 dismiss or summary judgment, we may never reach the 1806
6 issues. That may be a complete disposition of the matter,
7 but --

8 **MR. COPPOLINO:** If I could just clarify one thing.

9 **THE COURT:** In the event that motion is denied, I
10 want to hear your position and what plaintiff's position is
11 with respect to it.

12 **MR. COPPOLINO:** Is your Honor expecting that in our
13 -- we could certainly set fourth our views in opposition to
14 their views. That's not a problem.

15 But I would not contemplate actually commencing the
16 1806(f) proceedings in response to their motion, since in our
17 view that requires resolution of a number of threshold issues
18 and would require an Attorney General certification or
19 affidavit to trigger 1806(f). If that's off the table, then we
20 would just be presenting our issues and arguments.

21 **THE COURT:** You will have to respond to Mr.
22 Eisenberg's memorandum as it's -- and position as its filed.

23 **MR. COPPOLINO:** Thank you, your Honor.

24 **THE COURT:** All right?

25 In terms of page limits, 30 pages on the opening

1 briefs, 30 pages on the oppositions, 15 pages on the reply.
2 If we want more pages, I know that you are a position to
3 furnish them.

4 **MR. EISENBERG:** Your Honor, for our 1806 motion, the
5 page limits are more than adequate. I anticipate needing about
6 22 to 25 pages.

7 **THE COURT:** Oh, that's fine.

8 **MR. EISENBERG:** I will give you less than you are
9 allowing us, if you wish.

10 I would like to just briefly raise the issue of
11 classified filings by the government. We have seen a lot of
12 them in the past and I think we would benefit from some
13 guidance by some -- benefit from guidance by the Court as to
14 whether or not they would be appropriate now, because if there
15 are classified filings in Mr. Coppolino's motion, we would like
16 somehow the opportunity to respond to them in a secure manner.

17 Now, I don't know if Mr. Coppolino has in mind
18 further classified filings, so perhaps I need to turn -- turn
19 it over to him.

20 **MR. COPPOLINO:** Well, I suppose, your Honor, my short
21 answer would be, they can see what we file and respond to it in
22 opposition to our motion, because I'm not prepared to in any
23 way concede that we would not present the evidence we need, we
24 think that the Court needs to see, including ex parte in
25 camera, in order to decide the questions before it.

1 And, certainly, for example, if an Attorney General
2 authored certification is warranted, that, undoubtedly, would
3 be classified ex parte in camera; but in addition to that, the
4 purpose of their motion -- the purpose of the first question to
5 be decided, to decide whether they are aggrieved, to decide
6 whether that is established.

7 If we have facts and information which is classified
8 that can only be presented ex parte in camera, in order to
9 demonstrate to you the actual facts may differ or for other
10 reasons than what they aver in their complaint and we do that
11 on summary judgment, I think we would have the right to do
12 that. Otherwise, you would be asked to adjudicate a question
13 as to whether standing is established without access to the
14 facts.

15 We have to recognize, as I think the Court does, that
16 this is a proceeding that involves allegations of classified
17 foreign intelligence surveillance activities and this is not
18 about -- the objective of establishing standing is whether, in
19 fact, they have standing.

20 And if they are going to aver something on the public
21 record, as they have on their complaint, that they contend
22 proves by inference that they have standing and the actual
23 facts are clearly to the contrary, but remain classified, I
24 think we would have the right and opportunity to present those.

25 Now, whether you consider -- I don't think that

1 forecloses you from considering any argument they would make as
2 a matter of law as to whether you ought to consider that. We
3 certainly would object at any point to their having access to
4 that information.

5 **THE COURT:** Well, let me tell you what has been my
6 reaction to the filings in these cases here before. And that
7 has been that the classified materials that I have viewed in
8 connection with the state secrets issues that have been
9 litigated here, frankly, have not been very helpful in
10 resolving the issues that I have had to resolve.

11 And, consequently, I have come to the conclusion that
12 what I should do, if at all possible, is to address the issues
13 that are raised without resort to any classified information,
14 if I can.

15 So I think it behooves you, Mr. Coppolino, to be
16 sparing in your submission of such materials. Obviously,
17 sparing because of the sensitivity of those materials, but,
18 also, because it may very well be that resort to that
19 information is simply not necessary in order for you to present
20 your position. And you might very well -- and I'm not telling
21 you how to litigate your position, but you might very well take
22 the position that you don't think it's necessary to file
23 anything that's classified for purposes of the motions that we
24 are going to hear, but you reserve the right to do so at some
25 later time if the case proceeds.

1 So I don't want to stop you and I'm not going to
2 direct that you cannot file those kinds of materials, but bear
3 in mind I haven't been very helped by them in the past.

4 **MR. COPPOLINO:** Thank you, your Honor.

5 **THE COURT:** Okay.

6 **MR. EISENBERG:** If I can only add, your Honor, we
7 believe the issue here is whether or not we made a sufficient
8 showing based on unclassified information.

9 **THE COURT:** That does seem to be the issue.

10 **MR. EISENBERG:** That is the issue, and I don't see
11 how classified information could possibly have anything to do
12 with that determination.

13 So with that, I will thank you.

14 **THE COURT:** Very well.

15 Now, can we turn to the telecommunications cases.

16 **MS. COHN:** Good morning, your Honor. Cindy Cohn on
17 behalf of the MDL plaintiffs in the Hepting case.

18 **THE COURT:** Good morning, Miss Cohn.

19 **MR. PARRETT:** Good morning, your Honor. Vince
20 Parrett of Motley Rice for the Verizon customer plaintiffs.

21 **THE COURT:** Good morning.

22 **MR. OPSAHL:** Good morning. Kurt Opsahl, Electronic
23 Frontier Foundation, for the MDL plaintiffs.

24 **MS. BRICK:** Good morning, your Honor. Ann Brick,
25 ACLU of Northern California on behalf of plaintiff.

1 **MS. WHIPPLE:** Good morning, your Honor. Peggy
2 Whipple on behalf of only one of the two Missouri cases pending
3 before you, Clayton versus AT&T Communications, in which I am
4 plaintiff's counsel.

5 **THE COURT:** Very well.

6 **MR. HIMMELSTEIN:** Good morning, your Honor. Barry
7 Himmelstein from Lief, Cabraser, Heimann and Bernstein for the
8 MCI class plaintiffs.

9 **MR. WHEATON:** Your Honor, James Wheaton for First
10 Amendment Project on behalf of the potential intervenor Media
11 Alliance. I was asked this morning to appear and to discuss
12 procedures for that intervention.

13 **THE COURT:** Very well, Mr. Wheaton, good morning.

14 **MR. WHEATON:** Thank you.

15 **THE COURT:** Just a moment please.

16 (Brief pause.)

17 **THE COURT:** All right.

18 **MR. COPPOLINO:** Your Honor, Anthony Coppolino, again
19 for the United States.

20 **MR. ERICSON:** Bruce Ericson for the AT&T defendants.

21 **MR. BERENSON:** Brad Berenson, Sidley Austin LLP, for
22 the AT&T Cingular and Bell South defendants, your Honor.

23 **MR. WEISSMANN:** Good morning, your Honor. Henry
24 Weissmann of the Munger Tolls firm for the Verizon defendants.

25 **MR. JAIN:** Samir Jain at Wilmer Hale also for the

1 Verizon and MCI defendants.

2 **MR. KESTER:** Good morning, your Honor. John Kester,
3 Williams and Connolly, for Sprint Nextel. And I would like to
4 introduce my partner, Gilbert Greenman, also representing
5 Sprint Nextel.

6 **THE COURT:** Very well. Anybody else?

7 **MS. COHN:** Your Honor, if I may. I wanted to let you
8 know right away that we have in preparing for the immunity
9 issues to come up really come to the conclusion -- this is not
10 reflected in the CMC statement, which is why I raise it now,
11 that it would be useful and I think proprietary to combine the
12 cases against AT&T into a consolidated complaint for those
13 purposes.

14 Otherwise, I worry that we are going to end up with
15 some tag-along issues or some -- you know, the cases raise a
16 variety of claims in a variety of different ways. And I think
17 if we pull them all together into one complaint, the fight
18 about the immunity and its effect on the cases will be a lot
19 cleaner and easier for everyone.

20 I have a proposed schedule that adjusts things a
21 little bit in order to give us the time to do that. There are
22 23 cases against the AT&T defendants that would need to be
23 combined. Then it may make sense to also take Cingular and
24 Bell South in at that time, although I haven't finished my
25 thinking on that now that they are all owned by AT&T, but I

1 thought I would present a slightly revised schedule to reflect
2 that.

3 (Whereupon, document was tendered
4 to the Court.)

5 **MS. COHN:** I'm sorry to interrupt, and I know that
6 you probably have some thoughts, but since this is different
7 than what was in the case management statement, I wanted to
8 bring it to your attention right away.

9 **MR. BERENSON:** Your Honor, Brad Berenson for the AT&T
10 defendants.

11 We believe that the preparation and filing of a
12 consolidated complaint against AT&T is entirely unnecessary in
13 order for the Court to evaluate the immunity issues and will
14 just be a source of needless extra delay in a schedule that
15 everyone seems to agree should move forward expeditiously.

16 There are 23 complaints against the AT&T defendants.
17 As I understand it, the government is ready to file
18 certification and a motion with respect to those 23 complaints.
19 And all of the normal purposes that would be served by having a
20 consolidated complaint are utterly beside the point here, where
21 we are ready, willing and able to deal with the 23 complaints
22 individually.

23 So I would ask that leave not be granted to --

24 **THE COURT:** Let me ask you, Mr. Berenson, what role
25 do you think you and your colleagues representing the other

1 telecommunications carriers have in this? Isn't this really a
2 motion to be brought by the government and only by the
3 government?

4 **MR. BERENSON:** It absolutely is, your Honor. We do
5 not contemplate filing any motion of our own. The Attorney
6 General will file a certification, if appropriate, presumably
7 accompanied by some motion to dismiss.

8 And our role will be that specified for the parties
9 in the FISA Amendments Act itself, which is to brief whatever
10 legal issues arise out of that filing in order to be of some
11 assistance to the Court. That's really it.

12 **THE COURT:** I see. More briefs.

13 **MR. BERENSON:** That's what Congress has asked for,
14 your Honor.

15 **THE COURT:** Okay. All right.

16 Mr. Coppolino?

17 **MR. COPPOLINO:** The only point I would make on this
18 issue of the amended complaint, your Honor, without getting
19 into the larger issues that we have to address today is that as
20 Mr. Berenson pointed out, the Attorney General certification is
21 going to cover all of the actions that have been brought
22 against electronic communication service providers, including
23 the individual actions, including all the AT&T actions that
24 would be consolidated.

25 And so there is no need to do that in order to make

1 the certification and -- nor, in our view, should we have to
2 wait to do that to -- should we have to wait for another
3 consolidated complaint reiterating the same allegations of
4 assistance that are going to be at issue in the Attorney
5 General's certification in order to make that -- in order to
6 make that certification.

7 So I think the request is unnecessary because the
8 cases are already before the Court and they are cases as to
9 which the certification will be directed, and we certainly
10 would oppose it to the extent that it results in any delay.

11 But we can talk about the larger issues in dispute
12 between the parties as to how we proceed on that score when it
13 pleases the Court.

14 **THE COURT:** Well, it pleases the Court right now.

15 **MR. COPPOLINO:** Well, I think, your Honor, if you --
16 I know you have had an opportunity to study our case management
17 proceedings and the fundamental issue I think that's in dispute
18 is whether the government gets to file the motion that you just
19 mentioned to Mr. Berenson; that we have, in our view, the right
20 to file under the new FIZA Act amendments of 2008, along with
21 the Attorney General certifications. And it is -- it is one in
22 the same.

23 And our view -- when this statute was enacted or was
24 getting near enactment, I called Ms. Cohn -- or, actually, her
25 colleague Mr. Tien, who is on leave, I guess. I said, Congress

1 is about to pass this. We are obviously going to seek to
2 implement it at some point. Let's talk about a schedule.

3 And at that point the plaintiffs came back and said,
4 We don't want you to file your motion. We oppose your filing
5 your motion. And we are going to interpose a whole bunch of
6 objections to the act before you do so.

7 And I responded in different ways, but I think the
8 thrust of my response was, You can make any arguments you want
9 in opposition to our motion. Arguing, for example, that the
10 statute is unconstitutional. We have seen a lot in the
11 blogosphere about that. Arguing that there are questions of
12 law to be considered, as the Court considers our motion.

13 But we will, of course, file our motion and you can
14 then respond to it as the normal course is, as I think you just
15 indicated, was the course we would follow in Al Haramain.

16 All of plaintiffs' arguments that they foreshadowed
17 in the case management statement, all of them are classic
18 opposition arguments, or cross motion arguments, but there is
19 nothing --

20 **THE COURT:** You could hardly blame the plaintiffs for
21 that, Mr. Coppolino.

22 **MR. COPPOLINO:** Excuse me, your Honor?

23 **THE COURT:** You could hardly blame the plaintiffs for
24 that.

25 **MR. COPPOLINO:** No, but the point is, they are

1 opposition arguments. Nothing would require you to bar us from
2 filing our motion to begin with.

3 And I would add further that I don't believe they can
4 challenge any action that's taken until it is taken. There is
5 a fundamental right --

6 **THE COURT:** Perhaps I should hear from Miss Cohn on
7 this point.

8 After all, it does seem to me that on behalf of the
9 government, you are entitled under the FISA amendments to
10 proceed with the motion that you are contemplating. And it's
11 really Miss Cohn who has the uphill climb here and I should
12 give her the floor to tell me why what she is proposing, that I
13 must say does not appear to be in sync with the FISA
14 amendments, is the appropriate way to proceed.

15 **MS. COHN:** Sure, your Honor.

16 I think that, you know, the Court retains the plenary
17 authority to decide how cases should proceed and which motions
18 should come when.

19 I have certainly been in many meetings with a Court
20 where a judge has said, You know, it's too early for your
21 summary judgment motion, counsel. Go off and do some discovery
22 and come back, or you can do this motion now.

23 So I think under the rubric of your ability to kind
24 of control the reasonable process of this case as it goes
25 forward, you have the authority to decide which motions come

1 first, including the government's motion. I don't think there
2 is anything in the Congressional action that requires you to
3 set aside your ability to control the ordinarily -- ordinary
4 process of the case in front of its Court.

5 **THE COURT:** Well, that's certainly true. This
6 statute, however, is an unusual statute.

7 **MS. COHN:** Absolutely.

8 **THE COURT:** It appears to contemplate a procedure
9 more or less along the lines of that which the government has
10 outlined in its portion of the case management conference.

11 **MS. COHN:** Well, your Honor, I think that -- that
12 there are real important reasons why you should let the parties
13 take a stab at presenting the constitutional and, almost as
14 importantly, the statutory interpretation questions first.

15 First of all, I think it's a matter of -- simply as a
16 matter of judicial economy, if this statute is unconstitutional
17 as a threshold matter, which is what we believe it is, then we
18 don't need to reach a lot of complicated questions about how
19 actually to apply it.

20 **THE COURT:** Well, the problem I had with your
21 position is you don't ordinarily challenge the
22 constitutionality of a statute until you know that the statute
23 applies, and you might in your opposition be able to persuade
24 me that the statute does not apply to one or some other aspect
25 of this case, in which case we wouldn't have to reach the

1 constitutional issue.

2 **MS. COHN:** That's right, your Honor, but I think that
3 -- I don't think there is any question that the government is
4 going to apply the statute. Mr. Coppolino has said as much
5 here and he said it in papers and he said it in correspondence
6 with me.

7 So if there was a question about whether the
8 government was going to exercise its discretion to invoke the
9 statute, then there may be something, but I don't think that
10 there is any --

11 **THE COURT:** Well, there is a substantial evidence
12 standard which the government has to meet --

13 **MS. COHN:** That's right.

14 **THE COURT:** -- under this statute.

15 You may be able to persuade me that that government
16 has not met that substantial evidence threshold, in which case
17 we wouldn't have to reach the constitutionality issue.

18 **MS. COHN:** And that runs smack into the first, I
19 think, two real issues of statutory interpretation that we need
20 to sort out before we get into the matter of applying the
21 statute.

22 They have a substantial evidence standard that they
23 have to meet. That's a burden of proof, an evidentiary burden
24 of proof.

25 So I think that under the basic rules, this is

1 essentially -- this is a summary judgment motion that they are
2 going to be bringing. It doesn't qualify as a motion to
3 dismiss.

4 The statute itself says the government is either
5 going to bring a motion to dismiss or a motion for summary
6 judgment, but I think under the settled rules this is an
7 evidentiary motion. It's a motion for summary judgment.

8 Well, ordinarily in the context of a motion for
9 summary judgment the parties get to present evidence on both
10 sides, and we get to present our evidence. The question about
11 the Klein evidence and the Marcus evidence that's already in
12 the record in this case about the nature of the surveillance
13 that we allege is going on in the AT&T facility on Folsom
14 Street, the raft of Congressional admissions about the
15 surveillance that has been going on now for seven years.

16 The, actually, governmental admissions, many of which
17 have happened in the last couple of years that we brought in
18 front of the Ninth Circuit and can bring again in here.

19 Those are all pieces of evidence that we would like
20 to put forward that we already have to demonstrate that they
21 haven't met their burden of substantial evidence to show that
22 this was designed to stop a terrorist attacking of the United
23 States, which is their burden. That dragnet surveillance of
24 millions of ordinary Americans is not designed to prevent
25 terrorist attacks against the United States. So we want to put

1 in the evidence that we already have.

2 As far as I can tell from the papers, although the
3 government has been a little cagey about this, they do not
4 believe that you are entitled to look at this evidence and --
5 and so we are going to have a fight about that.

6 Secondly, in the context of a motion for summary
7 judgment situation or leading into one, the parties ordinarily
8 get a chance to do discovery so that we can develop additional
9 evidence in support of what we -- in addition to what we
10 already have and put that in front of the Court to say they
11 have not met their burden of substantial evidence.

12 But the government is envisioning a situation that
13 turns that on its head; that they get to move to get rid of our
14 case before we get the opportunity to try to develop and
15 present evidence about why it is they haven't met their burden.

16 **THE COURT:** How can I read this statute and come to a
17 conclusion that if the government is able to meet the
18 requirements of the statute, that Congress intended for this
19 statute to bar all of the cases against the telecommunications
20 carriers. And in light of that kind of statutory provision how
21 can I faithfully, with the provisions of the statute, do
22 anything other than to address that issue first?

23 **MS. COHN:** Well, your Honor, I think that the statute
24 doesn't say that without any evidence or any input from the
25 plaintiffs you have to decide whether -- they would have to --

1 **THE COURT:** We are not contemplating an ex parte
2 proceeding.

3 **MS. COHN:** Well, I believe actually that the
4 government effectively is in terms of evidence, and this is the
5 fight. I mean, this is what I want to sort out.

6 We think that they are -- we should be allowed -- and
7 there is nothing about this statute that prevents us, as far as
8 we can tell, from presenting the evidence we already have or
9 from gathering additional evidence using the ordinary Federal
10 Rules of Civil Procedure Section 26.

11 If Congress had wanted to prevent us from having any
12 ability to gather additional information in order to
13 demonstrate that the government hasn't met its evidentiary
14 burden, they know how to turn off discovery.

15 The Private Securities Litigation Reform Act of 1995,
16 for instance, has limitations on discovery where Congress has
17 clearly laid that out. There is nothing like that in the FISA
18 Amendments Act.

19 So unless Congress prevents us from having the
20 ability and the normal tools in a normal to gather evidence in
21 support of our position, we get those rights.

22 There is nothing in the statute that says Federal
23 Rule of Civil Procedure Section 26 doesn't apply or in any way
24 limits our ability to conduct this like we'd conduct a normal
25 case.

1 We have a burden here that's an evidentiary burden
2 and I think it's --

3 **THE COURT:** This is a brand new statute.

4 **MS. COHN:** It is.

5 **THE COURT:** Brand new. Hot off the government
6 printing office press.

7 **MS. COHN:** I wouldn't argue. That is true.

8 **THE COURT:** And there are clearly legal issues
9 associated with that statute, and the full implications of it
10 have certainly not been tested.

11 And under those circumstances why isn't the sensible
12 course of action to tee up what appear to be the dispositive
13 provisions of that statute and see whether or not they apply to
14 this case.

15 **MS. COHN:** Well, your Honor, I think that it would be
16 pretty unfair to tie both our hands behind our back and make us
17 go through that process, by not being able to present evidence
18 and not being able to develop additional evidence and then see
19 if we can fight their substantial evidence presentation.

20 **THE COURT:** The provisions of the statute don't
21 contemplate an evidentiary hearing at this threshold stage.

22 **MS. COHN:** Well, I think that they do, your Honor.
23 How else are we going to know whether they've made substantial
24 evidence? They have got an evidentiary burden.

25 Presumably, I think it's not crazy to think that our

1 burden is to present evidence to you showing that they haven't
2 made their burden, and so --

3 **THE COURT:** But there is nothing that prevents you
4 from trying to make that showing.

5 **MS. COHN:** Well, if we don't get discovery, then I'm
6 stuck with just what I have so far, which I'm not saying is
7 insubstantial, but I don't think it's fair to prevent us from
8 trying to gather more.

9 Basically to have to oppose their substantial
10 evidence presentation without the opportunity to develop the
11 evidence we need to counter it seems to be pretty unfair.

12 There is another reason as well why I don't think we
13 should run head-long into this, and that is -- those are some
14 of the issues that you referenced earlier, which is the secrecy
15 issues and the due process concerns with the secret evidence.

16 This certification process and motion process is set
17 up in a way where the Attorney General can trigger absolute
18 secrecy if they want to. You have -- takes away any discretion
19 that you have about the secrecy. It also actually requires you
20 to issue a secret order, a largely secret order without -- you
21 know, it's one thing for the Court to have discretion to decide
22 to keep things secret. That's not what this statute does.

23 This statute gives to the Attorney General the right
24 to demand that you have keep things secret, which, again, I
25 think is a part of why we think the statute is

1 unconstitutional.

2 And we'd certainly like the opportunity to present to
3 you why we think that part of the statute at a minimum should
4 not be enforced and that you should be empowered to decide
5 whether there are pieces of what the government has told you
6 under this provision that have no real basis for being kept
7 secret from the plaintiffs.

8 **THE COURT:** What I don't understand is why you can't
9 make all of these arguments in opposition to the motion?

10 **MS. COHN:** Well, I can, your Honor, but we are going
11 to end up in a situation with an extremely complicated brief
12 that I think will be hard for us and, certainly, I think will
13 be hard for the Court. Because I'm going to have to say, Well,
14 your Honor, if you get to consider the Klein and Marcus
15 evidence -- here is all the reasons you should consider the
16 Klein and Marcus evidence and if you decide that you agree with
17 me that you can consider the Klein and Marcus evidence, here is
18 my arguments against it.

19 Now, if you decide that you can't consider -- the
20 government is going to take the position, I suspect, that you
21 don't get to consider any evidence outside of what they give
22 you. So then I'm going to have to also back up and say, Well,
23 actually, if you don't get to consider Klein and Marcus, here
24 is all the reasons why we think that's a problem. And, by the
25 way, that's another reason why the whole thing is

1 unconstitutional because it sets up a system that really
2 deprives us of due process here.

3 I'm going to have to do the same thing about every
4 piece of evidence and then I'm going to have to write you a
5 section about all the other discovery that I would do if I had
6 the opportunity to do so and what I think that might do. And
7 you are going to have, you know, a kind of big if-then brief,
8 which is going to be a lot longer than if the parties all know
9 what the rules are before we brief this.

10 If I know I don't have to brief whether you get to
11 look at Klein and Marcus and you don't have to sort that out,
12 you can decide that first and then you will get clean briefs on
13 just the issues that we -- you know, you had determined are
14 relevant to the discussion.

15 I think that's the right way to go. It has this
16 extra benefit that I think is tremendously important, which is
17 that the Court doesn't have to look at the classified -- at the
18 secret filings under our ruling until after it's decided that
19 the statute actually is constitutional and should apply.

20 I think your Honor has been careful throughout this
21 litigation to try to limit the amount of secret evidence that
22 is presented and in this instance a secret ruling that is going
23 to be issued.

24 If you go the way that we are doing it, we can have a
25 bunch of threshold issues that can be completely on the record.

1 There is no secret evidence needed for our arguments and I
2 suspect not many for -- not for the government's responses
3 either because it's about the legality of the statute,
4 separation of powers questions and due process questions.

5 And we can have this part of the fight in the open,
6 as opposed to having to have a situation where there are a lot
7 of classified information -- not classified, but information
8 that the Attorney General has ordered to be kept secret from;
9 the parties, that the Court has to weed through and base its
10 decision on.

11 So I think that the due process problems are
12 worrisome here and that the course that we have charted is one
13 that would really leave the secrecy questions for the second
14 round and once we all have clarity on what the statute means
15 and whether it survives constitutional muster.

16 **THE COURT:** You think one round of motions like that
17 is going to provide clarity?

18 **MS. COHN:** Well, your Honor, I think you have been
19 pretty good at giving us really clear rules. Sometimes I agree
20 with them, sometimes I don't. But I think that it will really
21 help focus the questions.

22 This is a new statute. It has a lot of -- there is
23 room for multiple interpretations of many pieces of it.

24 We have stated our position, our statutory
25 interpretations in the CMC statement. The government has

1 pretty clearly not, and so we don't know exactly which parts
2 they disagree with. But I think it's fair to say they disagree
3 with us on discovery and I think it's fair to say that they
4 disagree with us on their ability to look at the entire record
5 in the case, including the evidence that the plaintiffs have
6 presented.

7 And I would just as soon get those questions sorted
8 out so that I can then brief you on the actual application of
9 the statute based on a clear understanding of what the statute
10 let's you do and look at.

11 This isn't a situation where there are kind of small
12 questions of statutory interpretation. These are very big
13 questions. You know, do the plaintiffs -- are the plaintiffs
14 denied their Federal Rule of Civil Procedure rights?

15 **THE COURT:** That's true, and it's important to bear
16 in mind that this is not the last stop on the railroad.

17 **MS. COHN:** It's true, but then we will end up going
18 up on appeal on questions about whether the Court looked at
19 everything it ought to look at, as opposed to whether the
20 actual decision of the Court was right or not, which I think
21 will result in much greater delay. I would just as soon go up
22 into the Ninth Circuit, where I suspect Mr. Coppolino will take
23 us if you rule in my favor, and I will probably go if you
24 don't, with an actual ruling about the statute itself as
25 opposed to side fights about what's appropriate for the Court

1 to look at and whether our due process rights were violated as
2 an application of this process, rather than the actual merits
3 of the decision.

4 So I think it behooves everybody to get some clarity
5 on the threshold issues before we go into the actual
6 application of the statute.

7 **THE COURT:** All right. Thank you, Miss Cohn.

8 As persuasive as Miss Cohn has been this morning, and
9 as she usually is, I am, however, not persuaded by her argument
10 that we ought to proceed to address the constitutionality of
11 the statute first. That does seem to me to put the cart before
12 the horse, as I read this statute.

13 Although, certainly, I cannot say that I have great
14 familiarity with the statute and, indeed, it's a new statute
15 and an unusual one providing for an unusual procedure.

16 . If the law were more highly developed in this
17 area.

18 And we knew exactly what this statute contains and
19 how it's applied and how it works and how it's intended to work
20 and so forth, why, I think the plaintiff's arguments about
21 scheduling would make a great deal more sense.

22 But I do think we need first to see if the statute
23 applies to these cases, to let the government make its
24 presentation in that regard, and to decide that issue as fully
25 as possible, and then decide how the cases are to proceed, if

1 at all, thereafter.

2 So what I would contemplate is a motion by the
3 government and, unless Mr. Coppolino persuades me otherwise or
4 Miss Cohn, I would contemplate essentially the same timing that
5 we have in the Al Haramain case, aiming toward a hearing in
6 early December and I would also contemplate some real
7 limitation on the briefs.

8 Mr. Berenson mentioned the fact that the
9 telecommunications providers want to weigh in with a lot of
10 briefs. It's foolish for a judge to refuse to accept learning
11 from whatever source it comes, but there is a limit on what the
12 Court can or is willing to read. And you can bear in mind that
13 I can always ask for more briefing if there is an issue that I
14 particularly want to hear about. It's been known to happen.

15 So what I'd really contemplate and appreciate is a
16 motion by the government, in the order of 30 pages, filed on
17 September 30, with opposition by the plaintiffs in October,
18 perhaps the same schedule as in Al Haramain, October 23 -- if
19 the plaintiffs want some more time, that would be fine -- with
20 any reply memorandum by the government on the 13th of November,
21 and a hearing also on December 2nd.

22 And, Mr. Berenson, can I persuade you to hold your
23 fire and not file any briefing?

24 **MR. BERENSON:** Your Honor, may we have a minute or
25 two to consult?

1 **THE COURT:** Sure.

2 (Discussion held off the record.)

3 **MS. COHN:** We can wait or I definitely have some --

4 **THE COURT:** You have some problem with that schedule?

5 **MS. COHN:** I do, your Honor.

6 **THE COURT:** Okay. Well, let's hold off and see what
7 the caucus on the other side of the courtroom produces.

8 **MS. COHN:** Can I ask a clarifying question? Or, I
9 guess, we should just wait?

10 **THE COURT:** Why don't we wait?

11 (Brief pause.)

12 **MR. BERENSON:** Your Honor?

13 **THE COURT:** Yes, Mr. Berenson.

14 **MR. BERENSON:** Your Honor, I think the defendants are
15 probably fine with the schedule that you've laid out, but we do
16 need a bit of clarification on one point.

17 Are you asking the telecom carriers to refrain from
18 filing a brief of their own --

19 **THE COURT:** Yes, yes.

20 **MR. BERENSON:** -- on whatever --

21 **THE COURT:** Yes.

22 **MR. BERENSON:** That I think we might have a problem
23 with, your Honor.

24 Under Section 1802(d) of the statute, Congress
25 specifically provides a role for the parties. It puts the

1 defendants, the private defendants, on the same footing as the
2 plaintiffs and says each are entitled to submit their views to
3 the Court on any legal issues that arise.

4 We would not need to file anything, I suspect, if the
5 plaintiffs' group were not challenging the constitutionality of
6 the statute, but to the extent they come before the Court and
7 tell you that this statutory mechanism which was two years in
8 the making by Congress is defective and cannot be applied, I
9 think the carriers will have some views on that that may not be
10 identical to the government's, but, in any event, would
11 hopefully supplement and flesh them out and we would like an
12 opportunity to make a submission.

13 **THE COURT:** Well, under those circumstances, isn't
14 the appropriate course to wait to see what the opposition is
15 that's filed by the plaintiffs? And if the plaintiffs raise
16 issues that are of concern to the telecommunications carriers,
17 then they can file a memorandum and, obviously, the plaintiffs
18 can respond to that memorandum.

19 How does that sound?

20 **MR. BERENSON:** That sounds all right, your Honor. If
21 the plaintiff's representations in the case management
22 statement remain their intentions, I think it's fairly clear
23 that they are going to respond to the government's motion by
24 saying that for somewhere between one and four or five reasons,
25 the FISA Amendments Act, Title II of it, which is the Carrier

1 Immunity Title, is unconstitutional.

2 So I would expect that we will come before the Court
3 and seek leave to make a filing of our own. We will ask you
4 for a number of pages commensurate with the number of pages
5 that the plaintiffs have devoted to attacking the
6 constitutionality of the statute and can file on that schedule
7 and, certainly, have no objection to the plaintiffs responding
8 to our arguments.

9 **THE COURT:** Can I count on one brief from all of the
10 telecommunications carriers?

11 **MR. BERENSON:** That you can, your Honor.

12 **THE COURT:** Fine. All right.

13 Miss Cohn has some concern or issue about the
14 schedule.

15 **MR. COPPOLINO:** Well, let me just make a point about
16 that. This may tie in to what Miss Cohn might have to say.

17 We can do it sooner. I mean, I don't think I have
18 ever said that to a Court. I can go sooner than September
19 30th. If you want to get the process started sooner, there is
20 no particular reason we would have to take until
21 September 30th. We are quite close to being ready to go.

22 So if your Honor was interested in having our motion
23 in sooner and getting started with that, we could advance this.
24 Otherwise, if not, we could go to with this schedule.

25 So as I understood it, your Honor, it would be our

1 motion, plaintiff's opposition, our reply and hearing. Just
2 the standard four track. Page limits, local rules.

3 And, as I say, if you want us to file sooner than the
4 30th, I think we can -- if it's okay with you, we could do
5 that, but you could also adjust the schedule.

6 **THE COURT:** Well, in light of the conversation that I
7 just had with Mr. Berenson, perhaps it makes sense to proceed
8 in that fashion, to accelerate the government's filing by some
9 number of days.

10 Let's see. Today is the 12th. When do you think you
11 could get your motion on file?

12 **MR. COPPOLINO:** I think I could get it on file within
13 a week, if not sooner. But a week, the 19th, would be
14 acceptable to us.

15 **THE COURT:** All right, the 19th.

16 And then, Ms. Cohn, if we follow that schedule, when
17 could you reasonably anticipate being able to file an
18 opposition?

19 **MS. COHN:** Well, your Honor, I think -- my problem is
20 not that one. It's what happens once the U.S. and the carriers
21 come in.

22 **THE COURT:** Well, let's take it one step at a time
23 and maybe we can work these out. Why don't you answer that
24 question that I just posed, and then we will see how that
25 affects the other problems you have in mind?

1 **MS. COHN:** If our first response is due on
2 October 23rd and they are going to file their motion by
3 September 19th, I think that's probably sufficient time.

4 **MR. COPPOLINO:** I think the whole schedule should
5 move up, your Honor, because we don't want to lose time in
6 responding to theirs.

7 Theirs is going to be the first brief we have seen
8 with all their opposition arguments. So I would hope that we
9 would have, you know, some adequate time to address them.

10 This schedule gives us 7, 13 -- 20 days. So my idea
11 was to move the schedule up, have a sooner hearing.

12 **THE COURT:** All right. September 19th for the
13 government's motion. How is October 16th for the plaintiff's
14 opposition?

15 **MS. COHN:** I think that's still doable. I guess the
16 question I have for you is, is that when we file our cross
17 motion?

18 **THE COURT:** Your cross motion?

19 **MS. COHN:** Well, we had envisioned this as a cross
20 motion for declaring the statute unconstitutional.

21 **THE COURT:** But isn't that really an opposition
22 argument?

23 **MS. COHN:** It could be framed either way, I think.

24 **THE COURT:** Okay. Let's --

25 **MS. COHN:** As long as there is sufficient pages, I

1 don't care whether I file one brief or two. The constitutional
2 arguments are not short.

3 **THE COURT:** Just remember, I can always ask for more
4 pages.

5 **MS. COHN:** I understand, your Honor, but,
6 unfortunately, Congress has made this statute problematic in
7 not just one way, but a number of ways and we do want to have
8 sufficient space to be able to address them in a reasonable
9 manner.

10 And that leads me to my other concern about this
11 briefing schedule, which is, if I understand what Mr. Berenson
12 is suggesting, he is suggesting that in the period that is a
13 reply, not only does the government do a reply brief -- and in
14 this particular instance, remember, their proposal is 50 pages
15 for the government and 50 page for them.

16 **THE COURT:** Well, we haven't -- I haven't agreed to
17 that.

18 **MS. COHN:** And their proposal for what they are
19 calling the sur reply -- and if we are going to do it that way,
20 I guess that's the right way. You could think of it that way.
21 We thought of it as a reply brief on our cross motion. I think
22 it's a certain level, six of one, half dozen of another.

23 You know, depending on the size of the briefing that
24 we are going to have to respond to starting on November 13th,
25 we are going to need -- we are going to need, you know, more

1 time and I think that's going to push the hearing date out as
2 well. Because, you know, their proposal -- and, again, I don't
3 know if they are going to still stick with it -- is that they
4 file 100 pages and then two weeks later we get 30 pages to
5 respond to their 100 pages and that -- that --

6 **THE COURT:** Forget about these pages. Forget about
7 the pages.

8 **MS. COHN:** Okay.

9 **THE COURT:** Nobody is going to get the kind of pages
10 you are talking about.

11 **MS. COHN:** Okay. Then, you know, again, you
12 understand these things are depending on the size of the
13 briefing we have to respond to, the timing that we are going to
14 need to do it --

15 **THE COURT:** Hold your horses. Hold your horses. Try
16 this schedule on for size.

17 **MS. COHN:** Okay.

18 **THE COURT:** Government files its motion on
19 September 19th. Plaintiffs' opposition, October 16th. The
20 government's reply and any telecommunications carrier response
21 to the plaintiffs' opposition on November 5th. And then the
22 plaintiffs' response to the telecommunication carriers
23 arguments, November 20. And a hearing December 2nd.

24 **MS. COHN:** Your Honor, I just want to make sure that
25 I'm following a couple things that I'm clarifying; that you are

1 taking the position that plaintiffs are not entitled to
2 discovery at this particular point?

3 **THE COURT:** That's correct.

4 **MS. COHN:** Is there a decision about whether we are
5 entitled to rely on the other evidence in the record in this
6 case, the Klein evidence and the Marcus evidence, or is that --

7 **THE COURT:** It's in the record. It seems to me you
8 can rely upon it.

9 **MS. COHN:** Okay. And we won't be filing a
10 consolidated complaint for AT&T plaintiffs?

11 **THE COURT:** No. I don't think that's necessary, any
12 more than I think it's necessary to wait for the mandate from
13 the Court of Appeals. I think that's just a ministerial
14 matter.

15 **MR. COPPOLINO:** I'm sorry, your Honor. Miss Cohn is
16 going to file the Klein material in her opposition? Is that
17 what was just --

18 **MS. COHN:** Well, it's in the record, so I was
19 assuming I would reference it rather than file it, but I
20 certainly want to have it included as part of what the Court
21 considers here.

22 **MR. COPPOLINO:** So I think we are set on the
23 schedule, your Honor, and I think --

24 **THE COURT:** All right. Page limitations.
25 Government's motion will not exceed 30 pages. The plaintiff's

1 opposition will not exceed 30 pages. The government's reply
2 memorandum will not exceed 15. Telecommunication carrier
3 brief, if any, will not exceed 30. And the opposition to the
4 telecommunication carrier's briefing by the plaintiffs will not
5 exceed 20 pages.

6 **MS. COHN:** Your Honor --

7 **THE COURT:** All right?

8 **MS. COHN:** Can I ask one more question?

9 **THE COURT:** You may.

10 **MS. COHN:** I hope it's the last one.

11 In the sur reply papers that you have given us 20
12 pages for, I was hoping two things.

13 One is that we could address any issues raised by the
14 government in their reply, as well as issues being raised by
15 the carriers.

16 **THE COURT:** But that -- that's a sur reply. Your
17 memorandum on the 20th of November should address the
18 telecommunications carrier's position.

19 If there is need for a sur reply because the
20 government has raised some new issue in its reply that was not
21 raised initially, then you have the ability to ask the Court to
22 file a sur reply, just like in any other case.

23 But a reply memorandum is to address only those
24 matters that are raised in opposition that you didn't have a
25 chance to address in your opening.

1 **MS. COHN:** Okay. And then --

2 **THE COURT:** Or I guess in this case it would be just
3 the opposite.

4 **MS. COHN:** It would be the opposite, the things that
5 were raised in the opposition.

6 **THE COURT:** Right.

7 **MS. COHN:** The other -- I guess the other request I
8 have -- and I understand your Honor is trying not to do pages,
9 but I would like an equal number of pages to respond to the
10 carriers, rather than a lesser number, since it's their first
11 argument.

12 **THE COURT:** All right. Fair enough.

13 **MS. COHN:** Okay.

14 **MR. BERENSON:** Your Honor, I don't want to spend a
15 lot of time arguing about pages --

16 **THE COURT:** You want to reply though.

17 **MR. BERENSON:** I just want to -- no. I just want to
18 make sure the Court understands that the guts of the briefing,
19 the main issues we'll all be arguing about will really be
20 kicked off by the plaintiff's filing on October the 16th.

21 So the oppositions that come in from the government
22 and from the carriers on November the 15th will essentially be
23 in the nature of an opposition. They will be responding to
24 arguments the plaintiffs have made against application of the
25 statute.

1 So that the filing on the 20th by the plaintiffs is
2 basically a reply brief, and it would be quite unorthodox for a
3 reply brief to have -- they will, in effect, have double the
4 number of pages that we will have to address the guts of the
5 issues that are before the Court if they have 30 on reply.
6 That's my only point.

7 **MR. COPPOLINO:** Your Honor, if I could just add.
8 Again, I really hate to dicker about pages, but as Mr. Berenson
9 points out, that is our first shot at their arguments. Could
10 we at least have the 30 pages?

11 And I can tell you right now our first brief is not
12 going to exceed the local page limit, so we don't need 30 on
13 that. If we could trade off some of that and have 30 for the
14 5th, we would be -- because that's our first shot at all her
15 constitutional arguments, all her arguments on statutory
16 interpretation, the Klein evidence, discovery, due process,
17 everything. 15 pages hardly seems like enough to deal with all
18 of that.

19 **MS. COHN:** As long as we are trading, I will take
20 more on opposition in exchange for -- less on response.

21 (Laughter.)

22 **THE COURT:** Well, all right, Mr. Coppolino. You can
23 have 30 pages on the 5th of November.

24 **MS. COHN:** Then, your Honor, I would like to have
25 some more pages to present our arguments than just 30. I said

1 that somewhat facetiously, but we were asking for a 60-page
2 brief.

3 There are -- so now at this point -- we were asking
4 for a 60-page brief just on the constitutional and statutory
5 interpretation issues.

6 As a result of your order today, we are not only
7 going to have to brief those, but brief the actual application
8 of the statute here, which is an additional thing. To try to
9 do that in 30 pages, I'm afraid that it's not going to be as
10 helpful to the Court as we would like it to be because we are
11 not going to really be able to address all three things that we
12 need to address here, which is constitutional problems,
13 statutory interpretation problems, and then the application of
14 the statute itself in just 30 pages.

15 It's a new statute. It's a case of first impression
16 and there is just a lot.

17 **THE COURT:** I gather Mr. Coppolino is telling me that
18 he can file his motion within the local rules limitation, which
19 I think is 25 pages.

20 **MR. COPPOLINO:** Right.

21 **MS. COHN:** That's because it's going to be all under
22 seal. I want to make sure that those page limits are
23 everything, not just the part that's public.

24 **MR. COPPOLINO:** No, it's going to be a public
25 submission. Motion, public memorandum of law, not to exceed 25

1 pages, your Honor.

2 **MS. COHN:** But the rubber really does meet the road,
3 I think -- I don't often agree with Mr. Berenson, but I think
4 he's right here.

5 The issue isn't the government's initial papers,
6 which I think are fairly straightforward. The issue is, can
7 the statute be applied at all and if so, how? Which really
8 doesn't kick in until we get to speak here. Because the
9 government's argument is going to be straightforward. They
10 think the statute applies. They don't think there is any
11 problem and they want our cases dismissed. That doesn't take
12 very many pages.

13 But to explain why the statute is the problem and,
14 you know, go through the statutory interpretation questions
15 and, obviously, make the argument that there is so much
16 interpretation here that -- the Court to do it, I think 30
17 pages is going to -- it's going to be pretty hard for us to lay
18 all that out in that time frame, in the page frame I guess.

19 **THE COURT:** All right. Well, Miss Cohn, I will give
20 you exactly the same number of pages as I'm giving the
21 defendants. You can have 40 pages for your opposition and 45
22 pages for your filing on the 20th of November.

23 **MS. COHN:** Thank you, your Honor.

24 **THE COURT:** 25 pages for the government. 30, 30, 85
25 -- 85 pages on both sides.

1 And counsel should not look pained at that. It's the
2 Court that should look pained at that.

3 All right? Anything further, counsel?

4 **MR. WHEATON:** Yes, your Honor. If I might be heard,
5 if we are concluded?

6 **MS. WHIPPLE:** Perhaps I should also ask, your Honor?
7 Peggy Whipple on behalf of Missouri Public Service Commission.

8 Could the order clearly include the single Missouri
9 case, which is postured like all the other plaintiff's cases,
10 in which only the telecommunications carriers are the
11 defendants?

12 And I'm the plaintiff's counsel. It will not affect
13 this briefing schedule at all. I cooperate fully with these
14 plaintiffs' counsel. I just want to make sure this case is not
15 forgotten.

16 **MR. COPPOLINO:** We do object to that, your Honor. If
17 I could address it? And I think Mr. Berenson may want to
18 address it as well.

19 Would you like me to --

20 **THE COURT:** I'm not sure I understand what you are
21 saying.

22 **MR. COPPOLINO:** Miss Whipple represents the State of
23 Missouri, I believe, and her lawsuit is related to other
24 pending lawsuits that the government has brought against
25 various state governments who have sought to investigate the

1 carriers for alleged intelligence activities.

2 The one difference in -- one of the Missouri cases as
3 to which they are plaintiffs is that they, I believe, have sued
4 to enforce requests for information, and that is the Clayton
5 case. In the Clayton case they are a plaintiff seeking the
6 information, a state regulatory body seeking the information.

7 The United States has also sued the State of
8 Missouri. So she represents them as a defendant. We have also
9 sued several other statutes: New Jersey, Vermont and a few
10 others, Maine, I think Connecticut is in there, too. So those
11 cases involving state regulatory actions have not been on the
12 table today. There is a separate provision of this statute,
13 which by statute preempts those state investigations.

14 Our view has been, and we have talked with state
15 counsel, including Miss Whipple, that we would separate that
16 issue out for a separate motion track because it concerns
17 separate issues. It concerns whether the Congress can preempt
18 state governments from investigating federal intelligence
19 activities. So they are not part of this schedule.

20 Now --

21 **THE COURT:** And that's the point you were trying to
22 make, Miss Whipple?

23 **MS. WHIPPLE:** That is the point I was trying to make.

24 In the Clayton case as it's currently postured, I
25 represent the plaintiff and the only defendants are six

1 Missouri AT&T telecommunications carriers.

2 Currently this case is more descriptive of the other
3 plaintiff's cases, and we would -- Mr. Coppolino and I have
4 talked, and the one thing that I think we don't disagree on is
5 that there is a fair argument to be raised in this one case
6 only. If it -- if it is appropriately put into either
7 category, it could be argued that it belongs in 802 and not
8 with the other cases that would fall under 803 in which the
9 government is the plaintiff and we are the defendants.

10 The government is not yet a party in the Clayton
11 case, has had more than two and a half years to intervene, has
12 never chosen to.

13 And so my request to the Court is to allow this case,
14 which currently fits into the 802 category, to actually remain
15 there. I don't envision any additional briefing or any changes
16 in the schedule. I will cooperate fully with all these
17 plaintiff's counsel. Then whatever this Court rules as to the
18 constitutionality and/or applicability of 802 will necessarily
19 become the law of the case for the Clayton case as well.

20 Frankly, if the Clayton case is resolved here -- this
21 is the consistent position I have taken before this Court --
22 the other Missouri case becomes at least moot. It will never
23 need to be reached.

24 **MR. COPPOLINO:** Your Honor, the problem is -- and
25 this was not teed up in the case management report because all

1 of the other states agreed to take those cases out of this case
2 management proceeding.

3 And the Clayton case, like all the other state cases,
4 are affected by a different provision of the statute; not the
5 would be that has to do with alleged assistance by telecom
6 carriers through the government, but one that specifically
7 preempts states from investigating the carriers. State
8 governmental authority. It's a completely different issue
9 requiring a completely different set of motions and briefs.

10 So if you throw Clayton into the mix, whatever
11 argument could be made that 802 applies, 803 certainly applies
12 and we would have to present that.

13 Now, we could kick that off and start a briefing
14 schedule on that, but none of the other state carrier counsel
15 are here to discuss case management proceedings on that. And,
16 you know, if we have to file a motion to deal with all of the
17 state cases, including Clayton, then that would have to be
18 added to the mix.

19 And my point simply was that we hadn't presented that
20 to the Court for any case management resolution.

21 **THE COURT:** It's certainly a new issue, Miss Whipple.

22 **MS. WHIPPLE:** Your Honor, my position would be that
23 the other cases are not at all affected by this. They are so
24 procedurally different from the Clayton case that whatever it
25 is we do here will become the law of the case for Clayton under

1 802.

2 **THE COURT:** Well, then, what do we have to discuss?

3 **MS. WHIPPLE:** Well, my worry, your Honor, is that if
4 the Clayton case is not specifically included in this case
5 management order, that when all the government cases are teed
6 up for this Court's consideration and I attempt to argue to the
7 Court that 802 and its processes should be applied to Clayton
8 and not 803, I expect to be met with the argument that I lost
9 my opportunity to present Clayton to the Court under 802 and
10 that those arguments are, therefore, somehow waived.

11 You see, the government cannot today assert 803
12 against the Clayton case. 803 requires the government to
13 initiate suit for enforcement. The government is not a party
14 in this case, not yet.

15 And it, by its own choice, has chosen not to be a
16 party; just as, by their own choices, the other state counsel
17 who had notice of this hearing have chosen not to come.

18 I come today only with my plaintiff's hat on and only
19 in the Clayton case, which I believe if it belongs anywhere,
20 belongs in this case management order with the other similarly
21 situated cases.

22 **THE COURT:** I'm going to --

23 **MR. BERENSON:** Your Honor, let me see if I can
24 simplify this. I will try.

25 The government's and the carriers' essential position

1 is that Clayton is a government case. It's not a private case
2 against the carriers.

3 There are two different provisions under Title II
4 that might result in dismissal.

5 One is Section 802, which is the Attorney General
6 certification we have been discussing.

7 The other, Section 803, which is a very clear express
8 preemption provision which basically displaces state authority
9 to investigate, sanction or sue carriers for alleged assistance
10 to the intelligence community.

11 All we are saying is that all of the state cases,
12 including the one out of the six in which the state is
13 plaintiff rather than defendant, raise the common legal issues
14 under 803 and ought to be considered together.

15 That doesn't mean 802 might not also apply to
16 Clayton. It might. But if all of the state cases are dealt
17 with together, 802 and 803 can be considered in that context.

18 **THE COURT:** Why isn't the sensible thing to do is to
19 proceed with the issues that we have discussed this morning and
20 then decide whether any of that has any import as far as the
21 Clayton case is concerned?

22 **MS. WHIPPLE:** Your Honor, I just heard Mr. Berenson
23 say, I believe, that he would not attempt to preclude me from
24 arguing the applicability of 802 at some later time. And I am
25 very relieved to hear that and think that, perhaps, we may have

1 just resolved this with the Court.

2 **THE COURT:** If you are relieved, I'm relieved.

3 **MR. BERENSON:** I can't speak for the government, but
4 we certainly will not attempt to preclude Miss Whipple from
5 making those arguments because 802 is just a second way for
6 Missouri to lose.

7 **MR. COPPOLINO:** That's right. And you have to look
8 at it in terms of when we seek to -- we sued the State of
9 Missouri, so the idea that we haven't intervened and somehow --
10 we filed a lawsuit, which is a great form of intervention.

11 And so when we -- then the next step would be for the
12 government, as plaintiff in these state cases, to seek summary
13 judgment based on the preemption provision and at that point
14 these issues regarding whether Section 802 applies, as well as
15 Section 803, would be on the table.

16 If Section 802 applies, the Attorney General
17 certifications as to any alleged carrier assistance by AT&T,
18 the certification would have been lodged connection with the
19 carrier cases.

20 But the question the Court is going to have first is,
21 are they preempted by Section 803, which statutorily does
22 preempt them. And that's the grounds on which we seek summary
23 judgment.

24 So let's just do them separately. That's my only
25 point, your Honor.

1 **THE COURT:** All right. Mr. Berenson and Miss Whipple
2 appear to be satisfied with the record as it presently stands,
3 so I'm not going to interfere with that.

4 **MS. WHIPPLE:** Thank you.

5 **MR. BERENSON:** Thank you, your Honor.

6 **THE COURT:** All right.

7 **MR. WHEATON:** Your Honor, on behalf of the media
8 alliance and its members, I was asked this morning to appear
9 and if materials are filed under seal under section --
10 Subsection (c), that we would intervene to seek an order such
11 that those materials, if they are sealed, will be sealed
12 pursuant to court orders, not pursuant to a declaration from
13 the Attorney General.

14 Under the statute if the Attorney General files a
15 declaration that the materials would harm national security,
16 then all of the materials submitted to the Court are reviewed
17 in camera. They are automatically sealed without further
18 review by the Court.

19 And, furthermore, the Court's own order dismissing
20 the action has to be sealed and cannot disclose the basis.

21 So we would seek to challenge those, if the Attorney
22 General takes advantage of Subsection (c) and files that
23 declaration.

24 **THE COURT:** All right.

25 **MR. WHEATON:** Having heard this morning, I think --

1 so we don't slow things down, we will wait the filing from the
2 Attorney General's Office and if things are under seal, then we
3 will seek leave to intervene at that point and just use the
4 normal procedures and page limits and all the rest of it.

5 **THE COURT:** That's fine.

6 **MR. COPPOLINO:** If Mr. Wheaton is going to move to
7 intervene, we would then oppose. Thank you.

8 **MR. WHEATON:** The only question I would have, should
9 we set a -- if we do that, should we set a hearing date --

10 **MR. COPPOLINO:** Why don't we do it on the same
11 schedule?

12 **THE COURT:** Well, let's wait. You can confer with
13 Mr. Coppolino.

14 **MR. WHEATON:** I will do that.

15 **THE COURT:** Obviously, you know what this schedule is
16 and you would have to fold your briefing into this schedule.

17 **MR. WHEATON:** We'll do that. Again, we are springing
18 this on people today, so we will meet-and-confer. Thank you,
19 your Honor.

20 **THE COURT:** Very well. Thank you, counsel.

21 **MR. KESTER:** Your Honor?

22 **THE COURT:** Mr. Kester?

23 **MR. KESTER:** I'm sorry, your Honor. 15 seconds for
24 one housekeeping matter, I think is the phrase that's used.

25 I assume I'm correct in thinking that all other

1 activities are stayed pending the Court's decision?

2 **THE COURT:** That's correct.

3 **MR. KESTER:** Thank you, your Honor.

4 **THE COURT:** Very well. Thank you, counsel. We look
5 forward to seeing you in a couple of months.

6 (Whereupon, further proceedings in the
7 above matter were adjourned.)

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CERTIFICATE OF REPORTER

I, DEBRA L. PAS, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings in MDL 06-1791 VRW, IN RE NATIONAL SECURITY AGENCY TELECOMMUNICATIONS RECORDS LITIGATION were reported by me, a certified shorthand reporter, and were thereafter transcribed under my direction into typewriting; that the foregoing is a full, complete and true record of said proceedings as bound by me at the time of filing.

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/s/ Debra L. Pas

Debra L. Pas, CSR 11916, CRR, RMR, RPR

Wednesday, November 5, 2008